No. 18-485

IN THE
Supreme Court of the United States

EDWARD G. MCDONOUGH,
Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

Smith's brief in opposition does not try to challenge the core contention of McDonough's petition: There is a clear, acknowledged split among the courts of appeals on a question of immense practical consequence for criminal defendants, public officials, and courts. *See* Amicus Br. of Criminal Defense Organizations et al. 15-21. Because the Second Circuit diverged below from the sensible rule adopted by multiple other courts of appeals, this case presents an ideal opportunity to resolve the important ques-

tion of when the statute of limitations begins to run for a Section 1983 claim based on fabrication of evidence. The Court should grant the petition and reverse.

ARGUMENT

I. SMITH DOES NOT CONTEST THAT THERE IS A CLEAR SPLIT.

Smith does not contest that there is a clear, acknowledged division of authority among the courts of appeals with respect to when the statute of limitations begins to run for a Section 1983 claim based on fabrication of evidence. The Second Circuit held below that the limitations period starts when the criminal defendant "becomes aware of th[e] tainted evidence and its improper use." Pet. App. 13a.[1] As the Second Circuit itself "acknowledge[d]," multiple other circuit courts disagree. *Id.* at 12a. The Third, Fifth, Sixth, Ninth, and Tenth Circuits have all held that the statute of limitations begins to run only once criminal proceedings terminate in the defendant's favor. *See Floyd* v. *Attorney General*, 722 F. App'x 112, 114 (3d Cir. 2018) (per curiam); *Castellano* v. *Fragozo*, 352 F.3d 939, 959-960 (5th Cir. 2003) (en banc); *Mills* v. *Barnard*, 869 F.3d 473, 484 (6th Cir. 2017) (citing *King* v. *Harwood*, 852 F.3d 568, 579 (6th Cir. 2017)); *Bradford* v. *Scherschligt*, 803 F.3d 382, 387-389 (9th Cir. 2015); *Mondragón* v. *Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008). This

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[1] Smith acknowledges that the Second Circuit has adopted a different rule in the analogous *Brady* context, where an official *withholds* exculpatory evidence. *See* Opp. 7.

acknowledged split is reason enough to grant the petition.

Smith similarly does not dispute that the Second Circuit split with the Seventh Circuit on the separate issue of whether the statute of limitations begins to run afresh each day a defendant's constitutional rights are violated. On remand in *Manuel* v. *City of Joliet*, the Seventh Circuit held that where a criminal defendant is detained based on fabricated evidence, the "wrong of detention without probable cause continues for the duration of the detention," and the criminal defendant's Section 1983 claim therefore "accrues when the detention ends." 903 F.3d 667, 670 (7th Cir. 2018) ("*Manuel II*"). In stark contrast, the Second Circuit here rejected McDonough's argument that the use of fabricated evidence in his case was a "continuing violation, that only ceased on his acquittal," and held instead that the statute of limitations on McDonough's claim began to run when he first "became aware of the fabricated evidence." Pet. App. 16a-17a (internal quotation marks omitted). This division in authority similarly warrants the Court's attention.

Smith's silence on *both* circuit splits speaks volumes. Without this Court's intervention, all parties agree that nothing more than geography will determine when the statute of limitations begins to run on a Section 1983 claim based on fabrication of evidence. The Court should grant certiorari and resolve the split.

II. THE SECOND CIRCUIT'S DECISION WAS WRONGLY DECIDED.

The brief in opposition ignores the circuit splits created by the decision below, and instead simply

asserts that the Second Circuit's decision was correct. *See* Opp. 1-3. But it is plain that the Second Circuit ignored the analytical approach set forth by this Court in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), and *Wallace* v. *Kato*, 549 U.S. 384 (2007), and departed from the majority rule adopted by multiple other courts of appeals. Nothing in Smith's brief saves the Second Circuit's flawed opinion.

In *Heck* and *Wallace*, this Court outlined the procedure for determining when the statute of limitations begins to run in a Section 1983 case: first, identify the right at issue; second, compare that right to the most analogous tort at common law; and third, apply the statute of limitations rule governing that analogous tort to the Section 1983 claim. *See Heck*, 512 U.S. at 483-487; *Wallace*, 549 U.S. at 388-390. The Second Circuit did not do that here. Indeed, despite quoting at length from the Second Circuit's opinion, Smith does not cite any part of that opinion analyzing the most analogous tort at common law, much less applying that tort's statute of limitations rule to McDonough's Section 1983 claim. *See* Opp. at 1-3.

If the Second Circuit had performed this analysis, it would have reached a different result. As the Court explained in *Wallace*, where a Section 1983 claim seeks damages for the violation of a constitutional right *after* the institution of legal process, the analogous common law tort is malicious prosecution. *See* 549 U.S. at 390. That is because the tort of malicious prosecution remedies the "wrongful institution of legal process" and the "wrongful use of judicial process." *Id.* (internal quotation marks and emphasis omitted); *see* Amicus Br. of Criminal Jus-

tice Institute of Harvard Law School 17 (explaining that the tort of malicious prosecution "center[s] around the misconduct of state officials * * * to attain a criminal conviction" and "offer[s] a recourse for individuals who have been targeted as defendants in unjust trials"). Importantly, the statute of limitations for the tort of malicious prosecution does not begin to run until "termination of the prior criminal proceeding in favor of the accused." *Heck*, 512 U.S. at 484. Because McDonough sought damages for the deprivation of his constitutional rights *after* legal process was instituted, Pet. 25-26, the statute of limitations began to run when criminal proceedings terminated in McDonough's favor.

Smith asserts that the "traditional federal rule of accrual" governs fabrication of evidence claims, and that the statute of limitations accordingly began to run "when the wrongful act or omission result[ed] in damages." Opp. 2 (internal quotation marks omitted). But this Court did not apply that rule in either *Heck* or *Wallace*. In *Wallace*, for example, the Court did not start the limitations clock at the time the criminal defendant was falsely arrested—and presumably began to suffer damages—but instead at the time the false arrest *ended*. *See* 549 U.S. at 389-390 & n.3. Smith similarly fails to account for the *six* courts of appeals that have departed from what he calls the "traditional" rule. *See supra* at 2-3. And in any event, even if the "traditional" rule applies here, McDonough's lawsuit is timely because the wrongful acts at issue—the use of fabricated evidence—continued throughout both of McDonough's trials. *See Manuel II*, 903 F.3d at 670; Amicus Br. of Cause of Action Institute 7 ("Fabricated evidence is not * * * an object discarded after initial use.").

Smith also asserts that the Second Circuit's approach is consistent with Justice Alito's dissent in *Manuel* v. *City of Joliet*, 137 S. Ct. 911 (2017) ("*Manuel I*"). *See* Opp. at 6. In *Manuel I*, Justice Alito expressed concern that the Fourth Amendment's concept of a "seizure" had been stretched too far in the *pre-trial detention* context. *See* 137 S. Ct. at 923, 927 (Alito, J., dissenting). Here, McDonough alleges that his constitutional rights were violated throughout two *jury trials*. *See* Pet. 25-26. McDonough's Section 1983 claim, moreover, is not limited to the Fourth Amendment, but also seeks relief under the Due Process Clause of the Fifth and Fourteenth Amendments—which Justice Alito suggested may be the proper "home" for the claim at issue in *Manuel I*. 137 S. Ct. at 923.

III. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS AN IMPORTANT QUESTION.

McDonough's case presents a clean vehicle to resolve the question presented. McDonough raised and preserved his Section 1983 claim based on fabrication of evidence before both the district court and the Second Circuit. Pet. App. 6a-8a, 47a-49a, 94a-95a. And each court directly addressed whether that claim was timely. *Id.* at 19a, 52a-53a, 94a. The question of when the statute of limitations begins to run on McDonough's claim is squarely before this Court and critical to the disposition of McDonough's case. The Court should grant certiorari to resolve this important question.

1. Smith asserts that McDonough's fabrication of evidence claim was somehow "subsumed" by his separate malicious prosecution claim. Opp. 8-9. That assertion is meritless. McDonough pressed

independent Section 1983 claims based on fabrication of evidence and malicious prosecution below, *see* Compl. ¶¶ 1209-1220, No. 1:15-CV-1505 (MAD/DJS), 2015 WL 9435166 (N.D.N.Y. Dec. 18, 2015), and the District Court analyzed them as separate causes of action, *see, e.g.*, Pet. App. 46a ("Plaintiff's three causes of action are well pled and succinctly stated * * *."); *id.* at 47a ("Plaintiff asserts a malicious prosecution and a fabrication of evidence claim against each of the Defendants."). The Second Circuit followed suit, dismissing McDonough's fabrication of evidence claim as untimely, Pet. App. 8a-9a, and McDonough's malicious prosecution claim as barred by absolute immunity, Pet. App. 17a-19a. McDonough has consistently argued—based on this Court's decisions in *Heck* and *Wallace*—that his fabrication of evidence claim is *analogous* to the tort of malicious prosecution, not that it is the same claim. *See* Pet. App. 6a.[2]

Smith appears to acknowledge this point. On the very first page of the brief in opposition, Smith quotes the Second Circuit's conclusion that McDonough's fabrication of evidence claim "is different from a malicious prosecution claim." Opp. 1 (quoting Pet. App. 8a). On the next page, he includes a lengthy excerpt of the opinion, which explains that fabrication of evidence and malicious prosecution are independent claims. Opp. 2. And on the page after

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[2] Smith asserts that McDonough did not appeal the dismissal of his malicious prosecution claim to the Second Circuit. *See* Opp. 8. That is plainly wrong. *See* Pet. App. 17a-19a & n.15 (discussing and then affirming dismissal of McDonough's malicious prosecution claim).

that, Smith explicitly states that fabrication of evidence and malicious prosecution "are discrete claims." Opp. 3. This makes perfect sense: A prosecutor may maliciously target an individual for prosecution without fabricating evidence, and a prosecutor may fabricate evidence even where there is cause to prosecute. *See Spencer* v. *Peters*, 857 F.3d 789, 801 (9th Cir. 2017); Restatement (Second) of Torts § 653 (1977); Amicus Br. of Criminal Defense Organizations et al. 20.

Smith cites (at 9-12) this Court's plurality opinion in *Albright* v. *Oliver*, 510 U.S. 266 (1994) (Rehnquist, C.J.), which held that "pretrial deprivations of liberty" were protected by the Fourth Amendment rather than "the concept of substantive due process." *Id.* at 271-275 (internal quotation marks omitted). That holding is irrelevant here. McDonough does not seek damages for unlawful arrest or detention prior to the institution of legal process. *See* Pet. 25. Nor did McDonough limit his Section 1983 suit to a single constitutional theory; as McDonough noted in his petition—and Smith does not contest—McDonough brought his Section 1983 claim based on fabrication of evidence under the Fourth, Fifth, Sixth, and Fourteenth Amendments. *See* Pet. 10 & n.2.

In any event, Smith's argument on this issue is forfeited. He did not argue below that McDonough's malicious prosecution and fabrication of evidence claims were one and the same, and he cannot do so for the first time before this Court. Nor did he file a cross-petition challenging the Second Circuit's established precedent on this issue, which holds that a criminal defendant may pursue "independent" Section 1983 claims based on malicious prosecution and

fabrication of evidence. *See, e.g.*, *Garnett* v. *Undercover Officer C0039*, 838 F.3d 265, 278 (2d Cir. 2016). Smith's argument on this issue is meritless, forfeited, and contradicted by his own brief.

2. Smith asserts that any policy concerns raised by this case were addressed by *Wallace*. *See* Opp. 4-5. That is incorrect. *Wallace* involved a claim for false arrest, which typically occurs prior to—and independent from—the wrongful institution and continuation of legal process. *See* 549 U.S. at 389-90; *see also* Amicus Br. of Criminal Justice Institute of Harvard Law School 20 (citing *Fifield* v. *Barrancotta*, 353 F. App'x 479, 481 (2d Cir. 2009)). Here, McDonough claims that Smith used fabricated evidence *throughout* the criminal proceedings against him, including two jury trials. This case accordingly raises different policy issues than those discussed in *Wallace*.

The importance of this case, moreover, is clear. "[D]eception of court and jury" offends the Constitution's "fundamental conceptions of justice." *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (per curiam). Yet fabrication of evidence in criminal proceedings remains a "serious, systemic problem." Amicus Br. of Criminal Defense Organizations et al. 15; Amicus Br. of Cause of Action Institute 4-6.[3] The Second Cir-

[3] Such claims are common throughout the courts of appeals. *See, e.g.*, *Garnett* v. *Undercover Officer C0039*, 838 F.3d 265, 279 (2d Cir. 2016); *Black* v. *Montgomery Cty.*, 835 F.3d 358, 370 (3d Cir. 2016); *Webb* v. *United States*, 789 F.3d 647, 667-670 (6th Cir. 2015); *Avery* v. *City of Milwaukee*, 847 F.3d 433, 441-443 (7th Cir. 2017); *Riddle* v. *Riepe*, 866 F.3d 943, 947-948 (8th Cir. 2017); *Caldwell* v. *City & Cty. of San Francisco*, 889 F.3d 1105, 1108-09 (9th Cir. 2018).

cuit's rule will make litigating these claims costlier and more unpredictable for courts, criminal defendants, and public officials, warranting this Court's intervention.

In the Second Circuit, to determine when the statute of limitations begins to run for a Section 1983 claim based on fabrication of evidence, courts will be required to determine when a criminal defendant *knew or should have known* that each piece of inaccurate evidence was actually falsified—a difficult and costly task, especially as witnesses "change or recant their stories" or physical evidence is later "reexamined in a wider context." Amicus Br. of Cause of Action Institute 11; Amicus Br. of Criminal Justice Institute of Harvard 8-9. And in many cases, it will require criminal defendants to file a civil suit *before* the wrongful conduct has ceased. *See* Pet. 33.

Nor will the Second Circuit's rule benefit public officials. "At a minimum," officials will have to respond to a criminal defendant's initial filing, and may have to sit for depositions and answer discovery, while parallel criminal proceedings are still underway. Amicus Br. of Cause of Action Institute 9; *see* Amicus Br. of Criminal Justice Institute of Harvard Law School 13. Criminal defendants, too, may have to answer questions in a deposition regarding what they know about evidence being used against them at trial—a procedure completely "at odds with the structure and goals of the criminal justice system." Amicus Br. of Criminal Defense Organizations 12. Although Smith assumes that many civil proceedings will be stayed, Opp. 4-5, the Second Circuit has imposed no such requirement. In some courts, civil claims may proceed in parallel with criminal pro-

ceedings involving the very same evidence—precisely what this Court cautioned against in *Heck*. Pet. 34.

Unless this Court intervenes, the Second Circuit's divergent rule will impose unnecessary costs on courts, create uncertainty for public officials, and erect new hurdles for criminal defendants seeking to vindicate fundamental constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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